Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1976

76-1497

GERARDO SANCHEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement of the Case	4
Reasons for Allowing the Writ	5
Conclusion	15
Appendix A—Opinion of the United States District Court for the Southern District	1a
Appendix B—Judgment of the United States Court of Appeals for the Second Circuit	27a

TABLE OF AUTHORITIES

Cases	*Page*
Abbate v. United States, 359 U.S. 187 (1959)	14
Ashe v. Swenson, 397 U.S. 436 (1970)	14
Barker v. Wingo, 407 U.S. 514 (1972)	10
Bartkus v. Illinois, 359 U.S. 204 (1959)	14
Benton v. Maryland, 395 U.S. 784 (1969)	14

Blackledge v. Perry, 417 U.S. 21 (1974) 6

Dillingham v. United States, 423 U.S. 64 (1975) 9

Elkins v. United States, 364 U.S. 206 (1960) 14

Fay v. Noia, 372 U.S. 391 (1963) 7

Gravitt v. United States, 523 F.2d 1211 (5th Cir. 1975), rehearing and rehearing *en banc* denied, 526 F. 2d 378 (1976) 10

Green v. United States, 355 U.S. 184 (1957) 7

Menna v. New York, 423 U.S. 61 (1975) 6

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 14

People v. Blakely, 34 N.Y. 2d 311, 314 (1974) 7

People v. Chirieleison, 3 N.Y. 2d 170, 174 (1957) 7

People v. White, 32 N.Y. 2d 393, 399-400 (1973) 7

Schneckloth v. Bustamonte, 412 U.S. 218, 238 (1973) . 7

United States v. Bommarita, 524 F.2d 140 [2d Cir. 1975] 14

United States v. Brookins, 383 F. Supp. 1212 (D. N.J. 1974), *aff'd* 524 F.2d 1404 (3d Cir. 1975) 15

United States v. Cabral, 475 F.2d 715 [1st Cir. 1973] .. 10

United States v. Castro, 401 F. Supp. 120 (N.D. Ill. 1975) 14

United States v. Doyle, 348 F.2d 715, [2d Cir.], *cert. den.* 382 U.S. 843 (1965) 6

United States v. Duke, 527 F.2d 386 [5th Cir. 1976] ... 10

United States v. Furey, 514 F.2d 1098 [2d Cir. 1975] .. 13

United States v. Hobbs, 392 F. Supp. 444 (D. Mass. 1975) 15

United States v. MacDonald, 531 F.2d 196, [4th Cir. 1976] 10

United States v. Mallah, 503 F.2d 971, [2d Cir. 1974] *cert. den.* 420 U.S. 995 (1975) 14

United States v. Mann, 451 F.2d 347 [2d Cir. 1971] ... 6

United States v. Marion, 404 U.S. 307, (1971) 9

United States v. Papa, 533 F.2d 815 [2d Cir. 1976] 14

United States v. Roberts, 515 F.2d 642 [2d Cir. 1975] . 11

Waller v. Florida, 397 U.S. 387 (1970) 14

CONSTITUTIONAL PROVISIONS

Constitution of the United States
Fifth Amendment 2
Sixth Amendment 2

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 48(b) 3

STATUTES

18 U.S.C. §4205(a) 4
21 U.S.C. §173 4
21 U.S.C. §174 4
26 U.S.C. §4731 14
26 U.S.C. §7237(a) 4
28 U.S.C. §1254(1) 2

Art 195, Federal Penal Code of Mexico 13

MISCELLANEOUS

Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 4 3

Single Convention on Narcotic Drugs, 1961 14

Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases, Rule 4 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

GERARDO SANCHEZ,
Petitioner.

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Gerardo Sanchez petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

OPINION BELOW

The opinions and rulings of the United States District Court for the Southern District of New York are unreported.

The District Court's opinion on petitioner's motion to dismiss on speedy trial and double jeopardy grounds, dated July 16, 1976, is printed as Appendix A.

The Court of Appeals affirmed the judgment of conviction without opinion (see Appendix B) on March 29, 1977.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on March 29, 1977. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioner waived his claims that the prosecution was barred by the speedy trial, due process and double jeopardy provisions of the Constitution by subsequently pleading guilty and stating during the plea colloquy that he waived the same.

2. Whether petitioner's arrest in Mexico in 1970 rendered him an "accused," so that the subsequent delay of almost six years denied petitioner his right to a speedy trial under the Sixth Amendment and the Due Process Clause of the Fifth Amendment.

3. Whether the prosecution in the court below was barred by the double jeopardy clause of the Fifth Amendment.

4. Whether cocaine has been misclassified as a narcotic drug.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States

Amendment V:

"Double Jeopardy

"No person shall . . . be twice put in jeopardy of life or limb. . . ."

Amendment V:

"Due Process

"No person shall . . . be deprived of life, liberty

or property, without due process of law. . . ."

Amendment VI:

"Jury Trial for Crimes, and Procedural Rights

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

Federal Rules of Criminal Procedure

Rule 48(b)

"Dismissal

"(b) By Court: If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Second Circuit Rules Regarding Prompt Disposition of Criminal Cases

Rule 4

"In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."

Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases

Rule 4

"In all cases the government must be ready for trial within six months from the date of the arrest,

service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

STATEMENT OF THE CASE

Petitioner was indicted with three others and charged with a conspiracy to violate former 21 U.S.C. §§173 and 174. On November 9, 1976 he pleaded guilty to a superseding information accusing him of violating 26 U.S.C. §7237(a). He was sentenced to five years imprisonment pursuant to 18 U.S.C. §4205(a).

On March 9, 1976 petitioner filed a motion to dismiss the indictment on the ground that the pre-indictment delay of almost five years violated his right to a speedy trial and represented a denial of due process. On March 22, 1976, Hector Echeverria—a co-defendant—sought to dismiss the indictment because it abridged his right not to be twice

placed in jeopardy. Petitioner joined in this motion. The Honorable Henry F. Werker denied both motions in an opinion dated July 16, 1976 (Appendix A).

Petitioner sought dismissal of the indictment in papers submitted July 2, 1976 on speedy trial grounds emanating from post-indictment delay. This application was likewise denied. The request was renewed on November 3, 1976 and denied, without opinion, from the bench on the date the guilty plea herein was entered.

Petitioner filed a petition for a writ of mandamus on November 1, 1976 with the United States Court of Appeals for the Second Circuit seeking to bar prosecution for the speedy trial and double jeopardy reasons previously advanced in the District Court. That motion was denied on November 12, 1976.

On April 5, 1976 the co-defendant Echeverria raised the issue that cocaine has been misclassified as a narcotic drug. Petitioner joined in this motion which was rejected.

The charges herein stem from a narcotics conspiracy which took place between December 1st and 30th, 1970. The investigation consisted of a joint effort by the United States and Mexico. It resulted in petitioner's arrest in Mexico on December 16, 1970. Sometime thereafter the American and Mexican authorities decided that the latter would prosecute. Petitioner was tried, convicted, acquitted on appeal and released after spending thirteen months in jail in Mexico. He promptly returned to the United States.

REASONS FOR ALLOWING THE WRIT

1. The Waiver Question.

Prior to his guilty plea petitioner raised all the issues presented on appeal both in the District Court and in a writ of mandamus in the Court of Appeals. Not until every remedy had been exhausted did petitioner enter his plea—

the only possible means left, other than a trial, for him to be in a position to assert before a higher court that his rights were trespassed by the prosecution in the lower court.

Nevertheless, the Government contended in the Court of Appeals that petitioner waived his right to appeal by entering a plea of guilty and by expressly and intentionally waiving it on the record.

Petitioner suggests that important questions heretofore not settled are present, to wit, the effect of a guilty plea upon a previously raised speedy trial claim and the propriety of conditioning a plea upon a waiver of appellate rights.

With respect to the former, the Second Circuit rule is that a guilty plea waives most issues, including any speedy trial contentions (*United States v. Mann*, 451 F.2d 347 [2d Cir. 1971]; *United States v. Doyle*, 348 F.2d 715 [2d Cir.], *cert. den.* 382 U.S. 843 [1965]). However, this Court's recent rulings cast down upon the continuing validity of that holding (*Menna v. New York*, 423 U.S. 61 [1975]); *Blackledge v. Perry* (417 U.S. 21 [1974]). It is urged that the constitutional issues raised herein do not go to guilt and therefore survive a guilty plea, where they have been duly asserted and rejected.

As to the alleged waiver herein, it is true that petitioner "waived" his right to appeal*. However, any waiver was

* During the plea proceeding the following colloquy took place:

"The Court: Is there any question you would like to ask the Court about it?

Defendant Sanchez: Frankly, yes.

The Court: What is it?

Defendant Sanchez: Well, I am responsible—I honestly think that I am guilty but I honestly think my constitutional rights were violated, and in my mind they were.

The Court: I understand, but that has been resolved against you by the Court's decision.

Defendant Sanchez: That is the only—

hardly an intentional relinquishment (*Schneckloth v. Bustamonte*, 412 U.S. 218, 238 [1973]; see *Fay v. Noia*, 372 U.S. 391, 398-399 [1963]; *Green v. United States*, 355 U.S. 184, 191-192 [1957]). Rather, it was improperly exacted from him and coercively obtained. Petitioner wanted to retain his right to appeal. It was conceded by the Government in their brief to the Court of Appeals that petitioner's counsel asked whether the prosecution would consent to the preservation of petitioner's appellate rights relating to the indictment. The response was no, unless he pleaded to the indictment, rather than to a superseding information. It was only after petitioner informed the District Court during the course of his plea, that in spite of his factual guilt, he believed that antecedent constitutional violations permeated the proceedings, that he was forced to waive that claim. "Here the prosecutor attempted, in effect, to deprive the defendant of his right to appeal the adverse determination of his speedy trial claim, by confronting him with a possibly unfair trial (because so tardy) on the one hand, and on the other offering him a reduced plea only if he would relinquish the speedy trial claim" (*People v. Blakely*, 34 N.Y. 2d 311, 314 [1974]; *accord*, *People v. White*, 32 N.Y. 2d 393, 399-400 [1973]; *People v. Chirieleison*, 3 N.Y. 2d 170, 174 [1957]). In conclusion,

The Court: You are talking about your speedy trial.

Defendant Sanchez: And my double jeopardy.

The Court: But those were both resolved against you by the Court's decision.

Defendant Sanchez: That was my only comment.

The Court: Yes.

Mr. Marmaro [Assistant United States Attorney]: Your Honor, it should be clear that the defendant is giving up all these rights by pleading to the superseding information, and that he will not take any further action with respect to those rights.

The Court: You have no right to appeal.

Defendant Sanchez: I am waiving it.

The Court: Yes; you understand that.

Defendant Sanchez: Yes."

even if petitioner "waived" his right to appeal, the waiver was involuntary, ineffective and a denial of due process. This case gives the Court the opportunity to resolve the propriety of allowing the Government to condition a plea upon such a waiver.

2. The Speedy Trial Question

Petitioner urges this Court to find a denial of his right to a speedy trial based upon the passing of five years and eleven months from the date of his arrest in Mexico until the date of his plea. The arrest took place on December 16, 1970. The filing of the indictment and the re-arrest of petitioner transpired on November 12, 1975. A Notice of Readiness was filed by the Government on March 1, 1976. Motions by petitioner and those indicted with him were decided on July 16, 1976.

Pursuant to telegrams issued by the trial court, petitioner and counsel appeared on September 9, 1976 and answered ready for trial. The proceedings on the date reflect that the Government also announced it was ready to proceed. However, its actual state of readiness appears dubious. A new Assistant United States Attorney had been assigned to the case and was not in court (subsequently, yet another Assistant would appear as counsel on the November trial date). Furthermore, the Government had not yet complied with a previously issued court order that it obtain certain documents for a co-defendant. In fact, Honorable Henry F. Werker stated, "Mr. Flannery [the Assistant assigned to the case] is not prepared to start tomorrow morning nor is the Court." The case was set down for trial on November 8, 1976. Petitioner pleaded guilty on November 9, 1976.

It is undisputed that American agents participated in the investigation, arrest, prosecution and detention of petitioner in Mexico. They separately fingerprinted and questioned him during his confinement. Thereafter, the

decision to prosecute in Mexico with American assistance was made pursuant to the Single Convention on Narcotic Drugs. When petitioner was finally released in Mexico, the United States request to be notified thereof was honored.

Based upon the foregoing, petitioner submits that he became an "accused" for speedy trial purposes when he was arrested in Mexico on December 16, 1970. In rejecting this concept, the District Court stated that it is "not bound by the actions of the Mexican court irrespective of the fact that American agents may have participated in the arrests or provided information which led to them." Petitioner, however, does not urge that "the actions of the Mexican court" control for speedy trial purposes, but only that American involvement, including the Mexican-American arrest, does. How far American authorities can go without rendering someone an "accused" for speedy trial purposes has not yet been settled by this Court.

This Court discussed the issue in *Dillingham v. United States* (423 U.S. 64 [1975]), where it noted that the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him" (423 U.S. at 65). The opinion went on to reaffirm the determination in *United States v. Marion* (404 U.S. 307, 320-321 [1971]) that:

> "To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (423 U.S. at 65).

Petitioner was arrested and detained for the same transaction which constitutes the subject matter of these

proceedings. It cannot be doubted that he suffered all the hardships and ignomies of arrest during his thirteen months in Mexican jails.

In *United States v. Cabral* (475 F.2d 715 [1st Cir. 1973] — a pre-*Dillingham* case— the court held the right to a speedy trial on a weapons charge in federal court attached at the time of the defendant's arrest by state authorities for other crimes, because the weapon seized at that arrest was turned over to the federal authorities three days later. The *Cabral* court rejected the notion that the date of the filing of the indictment controlled. Unlike the present situation, there the Government neither instigated nor participated in any way in the completely unrelated prosecution by a separate state sovereign.

The Fourth Circuit in *United States v. MacDonald* (531 F.2d 196, 204 [4th Cir. 1976]) followed the spirit of *Dillingham* and held that a military arrest activated the speedy trial guarantee of the Sixth Amendment, rather than a subsequent civilian arrest for the same acts. The tribunal thought that the Government had acted in its capacity as a "single sovereign"—a situation not unlike the present one which involves American control at all levels.

In the Fifth Circuit, too, an arrest by one sovereign may commence the running of speedy trial rights in another sovereignty and may require a hearing to determine the basis for the arrest (*Gravitt v. United States*, 523 F. 2d 1211, 1215 [5th Cir. 1975], rehearing and rehearing en banc denied, 526 F.2d 378, 379 [1976]; see *United States v. Duke* 527 F.2d 386, 388 n. 1 [5th Cir. 1976]).

Thus, the issue of when one becomes an "accused" has not been definitively set forth and presents an issue worthy of consideration by this Court.

With this background in mind, petitioner asks this Court to consider the factors it found controlling in *Barker v. Wingo* (407 U.S. 514 [1972]).

A. *Length of the delay*

The indictment was filed one month prior to the expiration of the Statute of Limitations. Another year passed before the scheduled trial date.

B. *Reason for the delay*

The delay up until November 12, 1975 is solely attributed to negligence on the part of the Government. The case file was in Florida and while working on an unrelated matter involving a co-defendant, the Government stumbled upon it. Considering petitioner's continuous availability, the undeniable knowledge of the American authorities, as revealed in the District Court's opinion (Appendix A, p. 20a) and the possession of the case file by an arm of the Government itself, this lack of due diligence is inexcusable.

Following petitioner's arraignment, an untested notice of readiness was filed almost four months later on March 1, 1976. After the lower court's rulings on these motions on July 16, 1976, the case was first scheduled on September 9, 1976 to be tried on November 8, 1976. Even without the benefit of a hearing, except for the period between March 1st, and July 16th, none of the delay can be even remotely attributed to petitioner. During the pendency of these motions, petitioner, too, was ready, subject to the government's response and the court's decision.

C. *Assertion of right*

Petitioner could not demand a trial until he learned of the existence of a prosecution in November 1975. As indicated above, petitioner raised the issue in the courts. Of course, even silence on his part would not constitute a waiver of his right to a speedy trial (*Barker v. Wingo, supra* at 526-527; *United States v. Roberts*, 515 F. 2d 642, 647 [2d Cir. 1975]). Nevertheless, petitioner appeared and answered ready on all dates after March 1, 1976, including September 9, 1976 after the pretrial motions had been decided.

D. *Prejudice*

Petitioner suffered thirteen months incarceration in Mexico before his conviction, flowing from the same transaction which forms the basis for the indictment herein, was reversed.

The anxiety, concern and financial loss to petitioner and his family were incurred from December, 1970 through January, 1972 and then renewed during the one-year pendency of the indictment. The travel restrictions imposed as a bail condition have prevented his participation in various educational programs, conferences and seminars related to his study of criminology. The extensive time and energy petitioner devoted to research and preparation for trial left no time for him to complete his thesis in criminal justice.

Petitioner was sentenced in the Southern District Court in Florida in 1972 and following his incarceration was on parole until June, 1976. The delay in prosecution deprived him of the opportunity of receiving a concurrent sentence with that term as well as with the Mexican sentence. Also, when sentenced in Florida, the Mexican arrest was part of the background in the pre-sentence report and, undoubtedly, prejudiced him then.

The public, too, is prejudiced, for imprisonment of the petitioner—a rehabilitated man following his parole and resumption of a respected role in the community—could perhaps have had a deterrent effect six years ago and now removes from society a useful and contributing citizen. Petitioner's work as a volunteer with drug abusers and his prior non-involvement in criminal enterprises attest to the harm, rather than benefit, this prosecution has produced.

The reach of the Due Process Clause also is at issue here (see *Blackledge v. Perry, supra* at 30-31).

In considering this claim, petitioner asks this Court to study the unique factual pattern outlined above, the merit

of the speedy trial arguments heretofore advanced and the similarities between this prosecution and the Mexican prosecution discussed again under Heading 3, *infra*. Also relevant are Rule 48(b) of the Federal Rules of Criminal Procedure, Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (approved January 5, 1971, effective July 5, 1971) and Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (approved February 28, 1973, effective April 1, 1973).

Rule 48(b) of the Federal Rules of Criminal Procedure provides an important speedy trial remedy with standards less strict than those imposed by the Sixth Amendment. Both the intent and spirit of this provision were violated.

The 1971 Second Circuit Rule and the Southern District Plan Rule in effect during the pendency of this case (see *United States v. Furey*, 514 F.2d 1098 [2d Cir. 1975]) use similar language and were not followed. An application seeking dismissal based upon them, as well as Rule 48(b), was denied in the District Court.

When these various factors are viewed together, petitioner submits that the basic unfairness of the prosecution herein surfaces and the due process clause compels dismissal of all charges.

3. The Double Jeopardy Question.

Although petitioner does not pose a typical double jeopardy claim, all the interests sought to be protected by that provision are present.

The prosecutions in Mexico and the United States of necessity rest upon different statutes.* Nevertheless, the

* The appellant was charged in the Federal District Court of Hermosillo, Sonora, Mexico with a violation of Article 195 of the Federal Penal Code, dealing with violations or Crimes Against Health: "Whoever elaborates, deals with, transports, possesses, buys, steals, supplies even gratis, or in general commits any act of acquisition, supply, transportation or traffic of narcotics without complying with the requirements set forth by the Laws, Agreements or International Treaties and other Sanitary dispositions as those mentioned in Art. 193."

relevant laws are aimed at the same evils and here are based upon the identical transaction.

Petitioner recognizes the dual sovereignty theory announced in *Abbate v. United States* (359 U.S. 187 [1959]) and *Bartkus v. Illinois* (359 U.S. 204 [1959]). However, subsequent cases have watered down the concept leaving its future viability in doubt (*Ashe v. Swenson*, 397 U.S. 436 [1970]; *Waller v. Florida*, 397 U.S. 387 [1970]; *Benton v. Maryland*, 395 U.S. 784 [1964]; *Murphy v. Waterfront Commission*, 378 U.S. 52 [1964]; *Elkins v. United States*, 364 U.S. 206 (1960).This case presents an opportunity for this Court to reconsider those decisions.

Finally, in view of the language utilized in *Ashe v. Swenson* (397 U.S. 436, 448 [1970] [Brennan J., concurring]), *United States v. Papa* (533 F.2d 815, 820 [2d Cir. 1976]), *United States v. Bommarita* (524 F.2d 140, 146 [2d Cir. 1975]) and *United States v. Mallah* (503 F.2d 971, 985 [2d Cir. 1974], *cert. den.* 420 U.S. 995 [1975]), petitioner maintains that the better and fairer standard in assessing double jeopardy claims involving conspiracy charges is the "same transaction test."

4. The Misclassification of Cocaine Question.

This Court has not decided whether the classification of cocaine as a narcotic drug constitutes a denial of due process and equal protection and subjects a defendant to cruel and unusual punishment. Appellant was indicted under the 1954 Internal Revenue Code, which became 26 U.S.C. §4731 and was repealed in 1970, effective May 1, 1971.

Assuming this Court finds no waiver of this claim by the plea of guilty, petitioner asks this Court to consider this issue on the merits or to remand for a hearing. Medical and scientific opinion exists to the effect that cocaine is actually a stimulant and not addictive (see *United States v. Castro*,

401 F. Supp. 120 [N.D. Ill. 1975]; *United States v. Hobbs*, 392 F. Supp. 444 [D. Mass. 1975]; *United States v. Brookins*, 383 F. Supp. 1212 [D. N.J. 1974], *aff'd* 524 F. 2d 1404 [3d Cir. 1975]). By grouping heroin and cocaine together, the statute ignores the different impact these drugs have on the health of the user and on society as a whole. The non-addictive nature of cocaine permits the cocaine user to stop taking the drug without feeling the effects of withdrawal created by a dependence upon a drug. Thus, it does not lead to crimes of violence by those addicts needing money to support an overpowering craving. This factor alone casts doubt on the constitutional validity of the classification as it now stands.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

GERARDO SANCHEZ, a/k/a "George Scott," a/k/a "Monguin," and HECTOR ECHEVERRIA, a/k/a "Liborio Morales,"

Defendants.

HENRY F. WERKER, D.J.

The defendants in this action are charged with conspiracy to violate 21 U.S.C. §§173 and 174. The indictment charges that the defendants conspired to bring narcotic drugs into the United States through Mexico and other countries unknown to the grand jury.

Motions have been filed on behalf of Gerardo Sanchez and Hector Echeverria to dismiss the indictment on several grounds. The court will consider each motion separately and where necessary will give the facts relevant to that particular motion.

Hector Echeverria has moved to dismiss the indictment on the grounds of former jeopardy, *res judicata,* collateral estoppel and comity. Mr. Echeverria has supplied the court with copies of seven federal indictments in which he has been named. However, for the purposes of this motion, it is necessary to review in some detail only three of them.[1]

Indictment 75 Cr. 1095

The instant indictment charges that on or about December 2, 1970, Gerardo Sanchez met with Luis Reyes and Julio Fuentes in Florida at which time it was arranged that Fuentes would go to Mexico to receive a cocaine shipment. On or about December 7, 1970, in Mexico City, Sanchez gave Fuentes an attache case containing approximately 6½ kilograms of cocaine. Sanchez told Fuentes to take the attache case to Hermosillo, Mexico and leave it in a hotel room. Fuentes was then to travel to San Diego, California, meet with Reyes and Roniel Medina, an unindicted co-conspirator, and return with them to Hermosillo to pick up the cocaine which was to be delivered to New York City.

Reyes and Medina flew from New York to Los Angeles and while en route, Reyes told Medina that the cocaine belonged to Echeverria. The two flew from Los Angeles to San Diego where they met Fuentes, Reyes, having noticed an agent of the BNDD following him, returned to New York and Fuentes and Medina travelled by car to Phoenix, Arizona, from which they had several telephone conversations with Sanchez who was then in New York.

On or about December 16, 1970, Sanchez, travelling under the name George Scott, and Echeverria, travelling under the name Liborio Morales went from New York to Tucson to Hermosillo. On that day, they went to the Hotel San Alberto where the cocaine had been concealed by Fuentes. Sanchez and Echeverria were arrested in Mexico and were charged by the Mexican authorities with unlawful possession of narcotics.

Indictment 72 Cr. 209

A judgment of conviction was entered against Echeverria on April 4, 1972. The indictment charged this defendant

and Ruben Pena and Carlos Fernandez with conspiring from October 1, 1970 to April 30, 1971 to sell narcotics in violation of 21 U.S.C. §§4705(a), 7237(b).

The evidence at trial showed that Pena had a connection in Chile with a supplier of cocaine, Francesco Guinart. Pena offered to sell this cocaine to Echeverria who stated that he would take all the cocaine Pena received. In June or July of 1970 a Chilean courier sent by Guinart gave Pena a suitcase containing about 8 kilograms of cocaine. Pena in turn gave the suitcase to Echeverria.

In August 1970, the same courier gave Pena a key to a locker in the Pennsylvania Railroad Station in New York and told him the locker contained approximately 4 kilograms of cocaine. Pena gave the key to Echeverria who paid for the cocaine.

In October, 1970, Pena was contacted by a different courier from Chile, Jaime Segura, who was in fact a government informer. Segura had obtained the cocaine from Guinart in Chile and gave it to BNDD agents there. The agents took the cocaine to New York where they had it chemically tested and put it under guard in a room in the Commodore Hotel. On October 22, 1970, Agent Pohl put one of the packages of cocaine from the Commodore Hotel into a locker in Grand Central Station. He then returned to the hotel and gave the key to Segura. Segura called Pena who came to the hotel and got the key. From there, Pena went to a restaurant where he gave the key to Echeverria. Later that night Echeverria retrieved the package from the locker.

The next day, virtually the same operation was repeated. The two remaining packages of cocaine were placed in a locker in Grand Central and the key was given to Segura. Later that night, Echeverria and a co-defendant, Carlos Fernandez, were seen entering the station. Fernandez took the package of cocaine from the locker and left the station with Echeverria.

Indictment 74 Cr. 18

On January 9, 1974, Echeverria and Luis Reyes, a co-defendant in the instant case, were indicted with twenty other defendants for violations of the federal narcotics laws. All of the defendants were charged with conspiracy to traffic in narcotics in violation of 21 U.S.C. §§173, 174. In addition, Reyes and Echeverria were each charged with a substantive offense. Echeverria was acquitted and Reyes was convicted on the conspiracy charge only.

The facts developed at trial related to the distribution of heroin in New York and New Jersey which had been shipped directly from South America. The heroin was smuggled into the United States from South America by Hovsep Caramian. It remained in the trunk of a car at John F. Kennedy International Airport until Roberto Arenas and Segundo Coronel agreed to take possession of it. Manuel Noa and Caramian went to the airport where Noa picked up the heroin and brought it to two apartments in Manhattan he had leased for keeping narcotics. After testing it and selling 5 kilograms, Noa, suspecting that he was being followed, gave the remaining 55 kilograms to Arenas. Coronel told Arenas that Raul Ortega, one of the indicted co-conspirators, would take the entire remaining shipment. Ortega, who lived in Florida, came to New York in mid or late February and picked up the heroin at Arenas' apartment on Audobon Avenue between 187th and 188th Streets. Ortega told Arenas he was taking the drugs to his sister's apartment in New Jersey. Subsequently, Caramian asked Arenas to return 20 kilograms. Ortega brought 20 kilograms back to Arenas' apartment, but Caramian only took 10 and Ortega left the apartment with the other 10 in a suitcase.

On March 11, 1970, in Miami, Florida, Ortega asked Gonzalez to assist him in distributing the 45 kilograms. He gave Gonzalez money to buy a heat sealer to seal plastic

bags and for his plane fare. During the plane ride to Newark Airport, Ortega told Gonzalez that 3 kilograms had already been sold to Jorge Infiesta, another defendant. The next morning, Ortega introduced Gonzalez to his sister and brother-in-law, Francesca and Ciro Calana, in whose apartment Ortega was storing 20 kilograms of the heroin.

Ortega and two co-conspirators, Gonzalez and Miguel Rodriguez, visited various Cuban bars and restaurants in upper Manhattan to find buyers for the heroin. The heroin was cut at the residences of two co-conspirators, Ciro Calana and Infiesta. Deliveries and subsequent payments were made in various locations in New York, including a gas station in Manhattan owned by Joaquin R. Prada, The distribution ran from about March 12, 1970 through May 1970, and the last payments were made in September 1970.

Most of the cutting, mixing, and rebagging of the heroin was done in the Calana's home. On one occasion it was done in Infiesta's Manhattan apartment with Infiesta and Reyes, who were partners, assisting. Reyes was in Infiesta's apartment on other occasions while the heroin was bagged for distribution, and on one occasion, Reyes left the apartment with 2½ kilograms of heroin supplied by Ortega.

The Second Circuit has recently reviewed the law regarding double jeopardy claims arising out of multiple narcotics conspiracy prosecutions. In *United States v. Papa*, Civ. No. 75-267 (2d Cir., April 2, 1976), the court adhered to the traditional rule that the defendant bears the initial burden of going forward to show that the prosecutions are actually for the same offense in law and in fact. *See United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. McCall*, 489 F.2d 359 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974). The offenses prosecuted in each indictment will be considered the same only if the evidence

required to support a conviction on one indictment is sufficient to sustain a conviction on the second. *United States v. Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972) *cert. denied*, 410 U.S. 983 (1973); *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961). The court in *Papa* modified the defendant's burden under this test to some extent by shifting the burden to the Government to rebut the inference of a unity of identity among multiple conspiracies once the defendant has introduced sufficient evidence that the several conspiracies alleged are in fact one. *Papa, supra* at 2987. Having examined the arguments and evidence put forth by this defendant, the court finds that Echeverria has failed to meet his initial burden to show that each of the conspiracies are in fact all part of one large enterprise. In so concluding the court is mindful of the fact that prosecutorial discretion may account for the fact that each indictment includes entirely different overt acts. *United States v. Mallah, supra* at 983.

A comparison of the activities alleged in the instant case and in indictment 72 Cr. 209 shows these operations to be entirely distinct. Echeverria is the only participant common to both, and there is no reason for the court to believe that any of the co-defendants in the instant case were additional personnel, not named in this earlier indictment, but who were nonetheless participants in the enterprise. All of Echeverria's participation in 72 Cr. 209 took place between August and October 1970 in the Pennsylvania and Grand Central Railroad Stations. The cocaine was imported directly from Chile by a courier from Francesco Guinart. The delivery of the cocaine in the case before the court took place outside the United States in Hermosillo, Mexico, to which Echeverria himself with his co-defendant Sanchez had travelled. Although the source of the drugs has not been identified, there is no evidence before the court that this is simply a continuation of the Guinart supply with merely a different method of delivery. It is significant that

Echeverria himself was to have smuggled the narcotics into the United States in the present indictment while in the conspiracy charged in 72 Cr. 209 he had no contact with the drugs until they had arrived in New York City. Furthermore, the present indictment charges that the conspiracy began on December 2, 1970, more than a month after the 72 Cr. 209 conspiracy had ended. Neither of these conspiracies can be compared in size and scope to the one described by the court in *United States v. Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Each of these two conspiracies had completely different personnel with the exception of Echeverria; the principal activities in each took place on two opposite sides of the United States. Thus it is the court's conclusion that the defendant has failed to come forward with any evidence to show that these conspiracies are in fact the same entity.

The court comes to the same conclusion with respect to the 74 Cr. 1095 indictment. Echeverria was acquitted on charges of conspiracy and substantive offenses. The trial indicated a large conspiracy to import and distribute heroin directly from South America. There is no indication that the government introduced any evidence to indicate that Echeverria occupied a pivotal position in that conspiracy. The court finds it significant that although both Reyes and Echeverria were alleged to be participants in both conspiracies, the principals, the method of operation, the locations of the important activities, and the majority of the participants are entirely different.

Echeverria asks the court to conclude that since both indictments charge violations of the same statute, they must refer to the same conspiracy. This begs the question. It is undoubtedly true that New York is large enough to support two independent but simultaneous drug conspiracies. *United States v. Mallah, supra* at 983. It is to be expected that the indictments for participation in two such ventures will charge the defendants named therein with

violations of the same criminal statute. Surely that is not sufficient to give rise to a claim of double jeopardy.

The court cannot conclude that there is but one conspiracy from the fact that the two ventures shared a common goal and two members. In fact the goals were different. In the instant case, the defendants allegedly sought to distribute a comparatively small shipment of cocaine of which they took possession in Mexico. In the prior indictments, twenty-two defendants were alleged to have taken part in the complex organization which distributed a large shipment of heroin imported from South America. The defendants used bases of operation in New York and New Jersey. Neither Echeverria nor Reyes were alleged to have had a pivotal role. The defendant has made no showing from which the court could infer that the instant prosecution is merely a part of the larger operation described above. Thus with respect to Echeverria's claim relating to prior federal prosecutions, the court finds the motion must be denied.

Mexican Prosecution

Defendants Echeverria and Sanchez[2] also move for dismissal of this indictment based on a prior prosecution in Mexico. As was noted above in the discussion of the instant indictment, they were arrested in Mexico for possession of cocaine and convicted by a trial court, but the Mexico Court of Appeals reversed the conviction and dismissed the indictment in an opinion and on grounds not put before the court. For the reasons set out below, the court denies this motion.

First, there is substantial doubt that the crime charged in Mexico is the same crime as that charged in the United States. Although the record of the Mexican proceedings has not been made available to the court, the Government contends that the Mexican prosecution charged possession

of cocaine while the instant indictment charges conspiracy.[3] Even if the first prosecution had been in a United States federal district court, the double jeopardy clause does not bar the prosecution of conspiracy to distribute or sell narcotics and the substantive offense of possession of those drugs in separate indictments. *United States v. Ortega-Alvarez*, 506 F.2d at 457. This is true even where the evidence to convict on one charge is similar to that required for the second provided that the elements of the crime are substantially different. *United States v. Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). Echeverria argues that where the evidence presented in the first trial includes almost every fact alleged in the second indictment double jeopardy prevents the second trial. However, as the Court of Appeals for the District of Columbia held, "[t]he issue . . . does not turn on the identity of evidence actually produced but on whether the same evidence is *required* to prove the two offenses." *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973) (emphasis in original). The defendants cannot reasonably contend that the evidence required to prove conspiracy to distribute narcotics is identical to that required to prove possession.

Second, the court concludes that the prohibition against dsouble jeopardy would not bar the trial of this offense even if the defendants were indicted for the same crime with which they are charged here. The Supreme Court has held consistently that the double jeopardy clause does not prohibit successive prosecutions by separate sovereigns for the same criminal act. *Waller v. Florida*, 397 U.S. 387 (1970); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

The defendant cites *United States v. Furlong*, 5 Wheat. (18 U.S.) 184 (1820) as authority for the proposition that an acquittal in a foreign country bars a retrial in this country. However, for several reasons this case does not

help the defendants' position. The authority of this case is severely undermined by the opinions in *Abbate and Bartkus.* In *Abbate* the Supreme Court noted that Justice Johnson had recognized the potential double jeopardy issue that arose when the courts of another country entered a judgment of acquittal against a defendant being charged for the same crime in this country. The Court viewed that situation as related to the problem it faced—whether a prior state prosecution barred a subsequent federal one. The Court resolved the question contrary to the way defendants propose. Nowhere in the opinion does the Court suggest that if the issue were to arise between the United States and a foreign country, the Court would view that problem any differently than it did the question of consecutive state and federal prosecutions. This conclusion is further supported by *Bartkus* in which the Supreme Court declined to rely on certain "dubious" English precedents concerning the effect of foreign criminal judgments on the ability of English courts to prosecute defendants on charges arising from the same conduct. *Bartkus, supra* at 128 n.9. In view of the Court's decision that the double jeopardy clause does not prevent a state from prosecuting a defendant after a federal prosecution for crimes arising out of the same conduct, this court refuses to find a constitutional bar to a trial on these charges.

This court agrees with the principles expressed by Chief Justice Taft in *United States v. Lanza,* 260 U.S. 377, 382 (1922) and finds them equally applicable to the case at bar.

> "Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

To hold otherwise would unnecessarily hinder federal law enforcement. It would be an intolerable burden to the federal judiciary to require it to analyze criminal prosecutions in foreign countries to determine to what extent, if any, such prosecutions are coterminus with a

pending federal action. This would require reliance upon the records of foreign countries which as has been demonstrated in this case are frequently difficult to obtain. It would impinge upon the sovereignty of the United States to hold that its authority to proceed against a criminal defendant depends upon the absence of similar proceedings in a foreign country.

Echeverria also urges the doctrines of collaterial estoppel, *res judicata* and comity as further grounds for dismissing this indictment citing the reversal and acquittal by the Mexican Court of Appeals. The court concludes that these contentions are without merit. First, it should be noted that an acquittal on a charge of possession does not necessarily require an acquittal on a charge of conspiracy since the elements of the crimes are different. Second, it is clearly the law of the United States that the reversal of a conviction by a Court of Appeals, even on the grounds that the evidence presented to the jury was legally insufficient, does ont bar a retrial of those same charges. *Green v. United States,* 355 U.S. 184 (1957). Where a defendant is convicted of a charge in a trial court and that judgment is reversed on an appeal which the defendant himself initiated, he may be retried on any of those charges. *Jones v. Breed,* 497 F.2d 1160 (9th Cir. 1974), *vacated on other grounds,* 421 U.S. 519 (1975). Thus, even if the charges were the same, the court finds no bar to the trial of these charges. The reversal by the Mexican Court of Appeals has in no way resulted in a conclusive determination of the issues before this court.

Collateral estoppel, a component of the constitutional guarantee against double jeopardy is equally unavailing. The Supreme Court held in *Ashe v. Swenson,* 397 U.S. 436, 444 (1970), that collateral estoppel applies to criminal proceedings and

> "[w]here a previous judgment of acquittal was based on a general verdict [the court must]

> 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " (footnote omitted).

Thus the doctrine of collateral estoppel "precludes prosecution when an issue of ultimate fact has been determined in a defendant's favor by a valid and final judgment in a prior proceeding between the same parties. . . . The defendant has the burden of establishing that the issue he seeks to foreclose from the second litigation was 'necessarily' resolved in his favor by the first verdict." *United States v. Seijo*, Civ. No. 75-1377 (2d Cir., June 24, 1976) at 4390 (citations omitted). It should be clear from the above formulations why the court is not constrained to dismiss this indictment on collateral estoppel grounds: first, this is not a litigation between the same parties that were before the court in the Mexican prosecution; second, the trial court did not resolve any issue in the defendants' favor; third, the defendant has not even tried to sustain the burden of proof that any such issue was necessarily resolved in his favor in the Mexican proceeding. No details of the Mexican prosecution have been supplied; rather, the defendant has merely reiterated repeatedly conclusory statements about the similarity of the proceedings. Any one of these reasons is fufficient to reject a bar to retrial under the doctrine of collateral estoppel; the combination of the three makes this conclusion inescapable.

The defendant urges the court to dismiss the indictment on the ground of comity. However, comity is a doctrine of discretion under which a court may enforce the laws of another country where they are not contrary to its own public policy or prejudicial to its interests. The doctrine does not require this court to dismiss an indictment

charging the commission of criminal acts in this country on the basis that the defendant's conviction for related criminal acts within Mexico was reversed by the appellate court of that country. There has been no proof on the subject of the foreign law on this subject, and there is no authority which suggests that the court's refusal to exercise its discretion violates the public policy or the principles of law of the United States. The motion is therefore denied.

As part of Echeverria's motion on former jeopardy, he asks this court for an order pursuant to Rule 17 of the Federal Rules of Criminal Procedure requesting the Mexican government to produce defendants' trial record in Mexico. Rule 17e(2) provides that a subpoena directed to a witness in a foreign country shall be pursuant to the provisions of 28 U.S.C. §1783. Section 1783, which relates to the subpoena of a person in a foreign country, refers only to nationals or residents of the United States who live in a foreign country, and courts have held specifically that aliens cannot be compelled to respond to a subpoena when they are, at the time of issuance, inhabitants of a foreign country. *United States v. Haim*, 218 F. Supp. 922 (S.D.N.Y. 1963); *United States v. Best*, 76 F. Supp. 138 (D. Mass. 1948), *aff'd*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951). Thus, the court must deny this request as being beyond the scope of its authority.

Echeverria has also moved for an order directing the United States Government to indicate and produce any evidence and information which it supplied to the Mexican authorities in the investigation of this case. This is an attempt to get indirectly what the defendant may not have directly. Rule 16(a)(2) excludes from the scope of proper discovery "reports, memoranda, or other internal governmental documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case." Furthermore, in response to an earlier motion by this defendant the court

has examined *in camera* the government's file with respect to this case and found nothing which is relevant to the preparation of the defense. The motion for an order requiring the Government to produce the evidence, if any, which it made available to the Mexican authorities is denied.

Echeverria has also moved for an order granting him the right to inspect the grand jury minutes with respect to seven specific indictments.[4] However, pre-trial disclosure of the contents of grand jury minutes is permitted only where there is some showing of particularized need. *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Ruggiero*, 472 F. 2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Youngblood*, 379 F.2d 365 (2d Cir. 1967). As the above discussion of the former jeopardy issue indicates, the court is satisfied that the indictments to which this defendant refers charge separate and distinct conspiracies.

Echeverria has failed to do more than make conclusory allegations about the relationship of these enterprises. The court concludes that the defendant has failed to meet the heavy burden which is required to violate the secrecy of the grand jury. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962); *cert. denied*, 371 U.S. 955 (1963).

With respect to the motion to dismiss the indictment on the ground that the defendant was singled out for prosecution in violation of the Department of Justice policy on double jeopardy, the defendant's papers are devoid of any allegations which even remotely suggest the accuracy of the statement. The motion is utterly frivolous and consequently is denied.

Furthermore, the court found above that the record shows on its face that the conspiracies with which this defendant has been charged are as a matter of law distinct. Therefore, the motion for a hearing on the issue and for an

order permitting the defendant to present the question to the jury is denied. *Short v. United States*, 91 F.2d 614 (4th Cir. 1937).

Defendant Sanchez has moved this court for dismissal of the indictment on the ground that this prosecution subjects the defendant to double jeopardy in that this indictment charges the same conspiracy as the one charged in indictment 72 Cr. 735 upon which a judgment of conviction was entered in the Southern District of Florida. The defendant must sustain the initial burden of going forward with respect to this claim. *United States v. Mallah, supra.* There is an absolute failure of proof with respect to this motion. The defendant has provided no memorandum, no affidavit, not even a copy of the Florida indictment in question. Furthermore, the minutes of a hearing on this indictment held on February 26, 1973 indicate that the charges involve a conspiracy to impede the Internal Revenue Service in its audit of and collection of taxes from two corporations and two individuals. These charges are clearly different from those charged in the instant indictment. Consequently the motion is denied.

Both Echeverria and Sanchez move to dismiss the indictment on the ground that it is barred by Article 36, para. 2(a)(i) of the Single Convention on Narcotic Drugs of 1961 to which Mexico and the United States are both signatories. For the reasons stated below, the court denies the motion. The thrust of the defendants' argument is that the treaty gives countries jurisdiction over criminal acts over which they would not ordinarily have jurisdiction. Thus where several acts in different countries are all part of one criminal enterprise, the country in which the principal acts were committed has jurisdiction to prosecute the defendant for all of the acts committed in furtherance of the offense irrespective of the actual location in which they were performed. The court agrees that this is one of the principle objectives of Article 36 of the Convention.

The general commentary to Article 36 provides that:

> "6. . . . [A]rticle 36 . . . tries to ensure that [for] all activities of the illicit traffic and all forms of participation in such activities not only the principal offenders[,] but also their accomplices, will be prosecuted, that activities of the illicit traffic will be subject to penal sanctions even fi they have not been completed (preparatory acts, conspiracy and attempts) [and] that criminals will not escape prosecution and punishment on the technical ground of lack of local jurisdiction in the country in which they are found. . . . "

However, the purposes of Article 36 are not limited to achieving only these objectives. On the contrary the commentary makes it clear that the purpose is to create and expand jurisdiction over drug-related offenses without offending national law. Thus paragraph 2(a)(i) provides, "Subject to the constitutional limitations of a Party, its legal system and domestic law, (a)(i). Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence."

Thus as the commentary states explicitly, "If the above-mentioned acts are committed in different countries and are consequently considered as distinct offences, each of these countries would have jurisdiction, on the basis of the universally accepted principle of territoriality, over those acts which were committed on their respective territories." (footnote omitted). The Convention, as it makes clear by its reference to the domestic law of each Party, intends its principles to become law only to the extent that they do not violate a particular Party's law of double jeopardy. Subject only to that limitation,

> "2. . . . The purpose of clause (i) is to give the courts of a country the necessary territorial jurisdiction in cases where they might not

> otherwise possess it, and in particular to ensure that a country shall have territorial jurisdiction over accessory acts even though the principal acts were not committed in its territory and even though it in general assigns jurisdiction over accessory acts to the courts in whose districts the principal acts were committed" (footnote omitted). Commentary, Single Convention on Narcotic Drugs, 1961, Art. 36, para. 2(a)(i).

As was made clear above, the instant prosecution does not violate the principles of double jeopardy as applied by the United States. It would be a perversion of the treaty's intent to find that it imposes a stricter rule of double jeopardy to the offenses to which the treaty applies than the United States would ordinarily apply in cases of successive prosecutions. As the commentary to paragraph 2(a)(ii) indicates, the drafters were primarily concerned with those jurisdictions in which "preparatory acts" are not a general category of punishable behavior or in which conspiracy may be prosecuted only as part of the substantive offense. The Convention encourages those Parties to view narcotic offenses as such grave acts as to warrant the separate prosecution of preparatory acts, provided that such prosecution would not violate that country's law of double jeopardy. Defendant's motion with respect to the Single Convention is denied.

Defendants Sanchez and Echeverria have also moved for dismissal of the indictment as violating their rights under the sixth amendment, Rule 48(b) of the Federal Rules of Criminal Procedure, and the due process clause of the fifth amendment. This court believes that the holding of *United States v. Marion*, 404 U.S. 307 (1971) dictates a denial of these motions.

The defendants, recognizing that there is little if any authority for dismissal of an indictment solely on the ground of pre-indictment delay,[5] suggest that the court

consider their arrests and trial in Mexico as constituting them as "accuseds" pursuant to *Dillingham v. United States*, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975), thus affording them the protection of the sixth amendment and Rule 48(b). However, as was discussed above the court is not bound by the actions of the Mexican court irrespective of the fact that American agents may have participated in the arrests or provided information which lead to them.

In *Marion* the defendants' company had been subject to a Federal Trade Commission cease-and-desist order and a series of newspaper articles had named the company as one engaging in fraudulent practices employed by home improvement firms. The article also quoted the United States Attorney for the District of Colombia, describing the activities of such companies and predicting forthcoming indictments. The United States Attorneys office asked the company to produce its records for inspection and interviewed Marion. Yet it was not until two years later that an indictment was handed down, three years after the alleged occurrence of the criminal acts. Nonetheless, the Court held that the defendants had not become "accuseds" until the indictment was filed. The defendants had been subjected to adverse publicity in their own district and were definitely aware that their activities were being investigated by the United States Attorney, yet, the Court refused to find that these burdens were sufficient to constitute the defendants as accuseds.

Here, the defendants were arrested, convicted and discharged in a foreign country. There was no continuing investigation by the United States Attorney with respect to this particular enterprise, until October of 1975. The United States government did not formally charge these defendants or take any other action which would result in these defendants becoming "accuseds." In *United States v. Ewell*, 383 U.S. 116, 120 (1966), the Court recognized that the purpose of the sixth amendment was "to prevent undue

and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of the accused to defend himself." Except perhaps to the last[6] these principles have not been violated. The defendants have not suffered substantial incarceration or lengthy public accusation and obloquy. Thus the court finds that the rule stated in *Marion*, which limits the guarantees of the sixth amendment to those who have been accused of a crime, should apply in the instant case.

The same rule applies to Federal Rule of Criminal Procedure 48(b) which by its terms applies to defendants "who ha[ve] been held to answer to the district court." "The rule clearly is limited to post-arrest situations." *United States v. Marion, supra* at 319 and cases cited therein.

The defendants assert that their defenses have been severely prejudiced by the delay in filing the indictment. They argue that even if the court denies the motion under the sixth amendment and Rule 48(b) the motion should nonetheless be granted pursuant to the dictates of the due process clause. As the Supreme Court held in *Marion*, if the defendants succeed in showing at trial that the pre-indictment delay has caused substantial prejudice to their rights to a fair trial and that the delay itself was an intentional device used by the Government to gain a tactical advantage over the accused, the court must at that time dismiss the indictment as violative of the due process clause of the fifth amendment. The court must await the Government's proof at trial and the defense's showing of prejudice to determine the extent, if any, of the actual prejudice to the defendant caused directly by the delay. In doing so the court will keep in mind the Supreme Court's admonition that every delay-caused detriment to a defendant's case does not necessarily require the dismissal of a criminal prosecution. *Hoffa v. United States*, 385 U.S. 293 (1966).

Echeverria also asserts that his right to a speedy trial has been violated by the eight-month delay since his indictment and urges the court to dismiss the indictment on that ground. This the Court will not do. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court explained the balancing process which the court must conduct to determine whether a defendant's right to a speedy trial has been violated. The four factors which the Court identified as important were the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. As this court has indicated previously, Sanchez and Echeverria have filed numerous and untimely pre-trial motions and Echeverria has failed to comply with directives of this Court. These defendants were indicted eight months ago; they have been released on bail for all but one week of that time. The Government filed a notice of readiness for trial as of March 1, 1976, four months after the filing of the indictment. The remaining four months have been consumed with defendants' motions.[7] Under these circumstances the court finds no denial of defendants' right to a speedy trial.

Defendant Sanchez moved for dismissal of the indictment on the ground that in exchange for a plea of *nolo contendere* the Government agreed not to prosecute him for charges known to it at the time of the plea. The court finds that the Government did know of this offense at that time and agrees that if the United States Attorney for the Southern District of Florida had made such an agreement, the United States Attorney in this district would be bound by that agreement. However, the minutes of a hearing held on February 26, 1973 and those of the sentencing on March 1, 1973 do not support the contention that the prosecutor agreed that Sanchez would be immune from further prosecution. Both hearings include extensive discussions regarding the contents of the agreement. Twice Sanchez acknowledged that the terms, as stated, were correct and

that no additional promises were made. The court denies the motion.

There are a few remaining miscellaneous requests in these motion papers which have already been resolved by this court during hearings on this matter. The court will merely reiterate those holdings for purposes of the record.

As to Echeverria's motion, filed February 2, 1976, the court has granted and the Government has complied with defendant's request for an order directing the Government to furnish copies of the exhibits introduced at a pre-indictment delay hearing before the Honorable Judge McMahon. In all other respects the February 2, 1976 motion has been denied.

As to Sanchez's motion filed March 9, 1976, the court will hold a suppression hearing just prior to the commencment of the trial with respect to Items V and VI. With respect to Items VIII and IX, the court entered an order on May 28, 1976. In open court, Item XIV was granted. In all other respects, the motion is denied.

The effect of this decision is to deny entirely the motions filed by Echeverria on March 22, 1976 and April 28, 1976.

With respect to requests for additional time to move against the indictment, the defendants may at any time during the trial move against the indictment. However, the time for such pre-trial motions has long since passed. Such requests are, therefore, denied.

SO ORDERED.

DATED: New York, New York
July 16, 1976.

s/ Henry F. Werker
U.S.D.J.

UNITED STATES v. SANCHEZ and ECHEVERRIA, 75 Civ. 1095 (HFW)

NOTES

1. Orders of nolle prosequi were filed on 4/14/72 with respect to 71 Cr. 1344 and 72 Cr. 179. 72 Cr. 1115 does not name Echeverria as an indicted co-conspirator. 73 Cr. 950 was superseded by 74 Cr. 18.

2. With the exception of a notice of motion, a brief recitation of the facts surrounding the defendant's arrest in Mexico and a translation of the Mexican statute under which he was charged, Sanchez has not submitted any affidavits or a memorandum of law with respect to his motion to dismiss the indictment on the grounds that it is barred by double jeopardy, collateral estoppel and *res judicata* because of the Mexican prosecution. Thus the defense's contentions to which the court refers are those of defendant Echeverria. However, the court will consider the arguments as if Sanchez had advanced them also.

3. Echeverria concedes that Mexico does not have the crime of conspiracy but urges the court to consider the possession charge as its functional equivalent.

4. Defendant Sanchez has made a similar motion with respect to the Grand Jury Minutes for this indictment and for 72 Cr. 735 again without any supporting material. The court will again treat Mr. Echeverria's motion as though it had been made on behalf of both defendants.

5. *See United States v. Marion*, 404 U.S. at 315 & nn. 7&8.

6. *See* discussion regarding deprivation of due process, *infra*.

7. For the record, the following is a list of the motions which have been filed to date:

FOR SANCHEZ

1. motion filed December 16, 1975 seeking return of all personal property;

2. motion without supporting affidavit filed January 5, 1976 (refiled on March 11 after compliance with local rule 3) seeking (1) to dismiss indictment on the ground of double jeopardy, (2) to dismiss indictment on the grounds of double jeopardy, *res judicata*, and collateral estoppel, (3) to dismiss the indictment for denial of speedy trial based on pre-indictment delay, (4) to prohibit use of evidence as fruit of an illegal search and seizure or electronic surveillance, (5) to prohibit use of evidence obtained in violation of fifth and sixth amendments, (6) to permit defendant to inspect grand jury minutes, (7) to permit defendant to travel to every place, among others, where overt act committed, (8) bill of particulars, (9) discovery and inspection, (10) to dismiss indictment for repugnancy, (11-13) severance on several grounds, (14) to permit defendant to join in motions of co-defendants;

3. motion filed May 24, 1976 to dismiss indictment on the ground that the Government had agreed not to prosecute defendant for these charges;

4. motion filed July 2, 1976 to dismiss for denial of speedy trial based on post-indictment delay.

FOR ECHEVERRIA

1. motion filed December 16, 1975 to proceed *pro se;*

2. motion filed December 16, 1975 for return of personal property and to suppress all evidence obtained at time of arrest;

3. motion filed January 5, 1976 for more time to make motions;

4. motion filed January 6, 1976, returned for failure to comply with Local Rule 3;

5. motion filed February 2, 1976 seeking (1) to dismiss indictment for denial of speedy trial based on pre-indictment delay, (2) to obtain copies of Government exhibits in former proceedings, (3) to obtain documents, internal memoranda and 3500 material;

6. motion filed March 9, 1976 to suppress evidence unlawfully seized;

7. motion filed March 9, 1976 seeking (1) to suppress statements taken in violation of fifth and sixth amendments, (2-4) severance on several grounds, (5) a Government paid, defense-chosen expert assistant, (6) to join in all motions of co-defendants, (7) a hearing on factual issues raised in motion, (8) to dismiss the indictment for repugnancy, (9) additional time to move against the indictment;

8. motion filed on March 22, 1976 seeking (1) to dismiss indictment on grounds of former jeopardy, *res judicata*, collateral estoppel, and comity, (2) an order requesting information from Mexican Government, (3) an order directing Government to produce certain information and evidence, (4-5) to dismiss the indictment on the ground of double jeopardy, (6) to permit defendant to inspect grand jury minutes, (7) to dismiss indictment because defendant was singled out for prosecution in violation of Department of Justice policy on double jeopardy, (8) for a hearing on factual issues raised by motion, (9) to permit defendant to submit former jeopardy issue to jury;

9. motion filed March 29, 1976 to direct Government to stop illegal and unethical conduct;

10. motion filed April 5, 1976 to dismiss the indictment because cocaine has been misclassified as a narcotic drug;

11. motion filed April 5, 1976 for appointment of Martin Sostre as trial interpreter;

12. motion filed April 13, 1976 for prompt disposition of the case;

13. motion filed April 17, 1976 for court to disregard prosecutor's statements;

14. motion filed April 21, 1976 to dismiss indictment based on additional actual prejudices;

15. motion filed April 23, 1976 to dismiss indictment for failure to allege violation of statutes on which indictment is based;

16. motion filed April 23, 1976 seeking (1) to dismiss indictment for pre-indictment delay, (2) permission to travel to Mexico, (3) travel expenses;

17. motion filed April 28, 1976 to require Government to produce files from archives;

18. motion filed April 28, 1976 to dismiss indictment pursuant to Single Convention on Narcotic Drugs;

19. order to show cause filed May 27, 1976 to obtain exhibit;

20. motion filed June 2, 1976 to dismiss indictment for denial of speedy trial based on post-indictment delay;

21. order to show cause filed June 30, 1976 to obtain facts and documents;

22. motion filed July 1, 1976 seeking (1) a bill of particulars, (2) discovery and inspection, (3) in-

formation regarding Government informer, (4) additional time to move against indictment.

FOR REYES

1. motion filed June 7, 1976 seeking (1) to dismiss the indictment pursuant to the Constitution and the Federal Rules of Criminal Procedure, (2) additional discovery, (3) to join in motions of all other defendants.

APPENDIX B
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD
HON. MURRAY I. GURFEIN
Circuit Judges
HON. JON O. NEWMAN
District Judge

United States of America,
Plaintiff-Appellee

v.

Gerardo Sanchez,
Defendant-Appellant.

77-1020

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk